115-540

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 875.

D. M. FERRY AND COMPANY, PLAINTIFFS IN ERROR,

vs.

WILLIAM LIVINGSTON, JUNIOR, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF DETROIT.

No. 876.

WILLIAM LIVINGSTON, JUNIOR, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF DETROIT, PLAINTIFF IN ERROR,

vs.

D. M. FERRY AND COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED JULY 9, 1885.

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1 *Declaration.*

The Circuit Court of the United States for the Eastern District of Michigan.

UNITED STATES OF AMERICA,
Eastern District of Michigan, } ss:

D. M. Ferry & Company, a corporation existing by and under the laws of the State of Michigan, plaintiff in this suit, by Otto Kirchner, its attorney, brings this action against William Livingston, Jr., collector of customs of the district of Detroit, under section 3011 of the Revised Statutes of the United States, the said plaintiff filing this its declaration as commencement of suit.

For that the plaintiff heretofore, to wit, on the 17th day of December, A. D. 1884, at Detroit, in said district, did import and enter for importation a large quantity of mangel wurzel seed of great value, to wit, of the value of one thousand five hundred and sixty-four dollars, upon which the said defendant, being then and there collector of customs of the district of Detroit, in said district, did, on the day and year last aforesaid, ascertain and impose the sum of $312.80—say three hundred and twelve $\frac{80}{100}$ dollars—as a duty upon said mangel wurzel seed, and the plaintiff avers that it did then and there insist and protest to said defendant that said ascertainment and imposition was wholly without warrant of law, and did then and there demand possession of said goods of said defendant; that afterwards, and on the twenty-fourth day of December, A. D. 1884, in order to obtain possession of said mangel wurzel seeds imported by it, the plaintiff paid to said defendants said sum of three hundred and twelve $\frac{80}{100}$ dollars under protest, which said protest was in writing and signed by the plaintiff and its agents in that behalf, and was made and delivered to said defendant at the time of said payment, and set forth distinctly and specifically the grounds of objection to the amount claimed, and afterward, and on thirtieth day of December, A. D. 1884, the said plaintiff did appeal from said ascertainment and liquidation to the Secretary of the Treasury, and afterwards, and on the nineteenth day of January, A. D. 1885, the said Secretary of the Treasury did overrule said appeal and affirm said ascertainment and liquidation, and the plaintiff avers that the amount of said duties was not authorized by law, and that by reason of said several premises and by virtue of said section 3011 of the Revised Statutes of the United States an action hath accrued to him against said defendant to the plaintiff's damage, five hundred dollars, and therefore it brings suits, &c.

And also for that the plaintiff heretofore, to wit, on the 17th day of December, A. D. 1884, at Detroit, in said district, did import and enter for importation a large quantity of beet seed of great value, to wit, of the value of six hundred and thirty-five dollars; a large quantity of cabbage seeds of great value, to wit, of the value of five hundred and four dollars; a large quantity of turnip seed of great value, to wit, of the value of ninety-nine dollars, and a quanty of

2 Swiss chards, a species of beets of great value, to wit, of the value of sixty-three dollars and thirty cents, upon which the defendant, being then and there collector of customs of the district of Detroit, in said district, and on the day and year last aforesaid, [did] ascertain and impose the sum of $120.00 as a duty upon said beet seeds, and the further sum of $100.80 as a duty upon said cabbage seed, and the further sum of $19.80 as a duty upon said turnip seed, and the further sum of $12.60 as a duty upon said Swiss chard seed, making in all the sum of two hundred and fifty dollars and twenty cents imposed as a duty by said defendant upon said several seeds; and the plaintiff avers that it did then and there insist and protest to said defendant that said ascertainment and imposition was wholly without warrant of law, and did then and there demand possession of said goods of said defendant; that afterwards, and on the twenty-fourth day of December, A. D. 1884, in order to obtain possession of said several seeds imported by the plaintiff, [he] paid to said defendant said sum of three hundred and twelve $\frac{80}{100}$ dollars under protest, which said protest was in writing, and signed by the plaintiff and its agents in that behalf, and was made and delivered to said defendant at the time of said payment, and set forth distinctly and specifically the grounds of objection to the amount claimed, and afterwards, and on the thirtieth day of December, A. D. 1884, the said plaintiff did appeal from said ascertainment and liquidation to the Secretary of the Treasury; and afterwards, on the nineteenth day of January, A. D. 1885, the said the Secretary of the Treasury did overrule said appeal and affirm said ascertainment and liquidation; and the plaintiff avers that the amount of said duties was not authorized by law, and that by reason of said several premises, and by virtue of said section 3011 of the Revised Statutes of the United States, an action hath accrued to it against said defendant to the plaintiff's damage, one thousand dollars, and, therefore, it brings suit, &c.

OTTO KIRCHNER, *Pl'ff's Att'y.*

Endorsed: 7172. U. S. circuit court, eastern district Michigan. D. M. Ferry & Co. *vs.* William Livingston, Jr. Declaration. Filed January 29, 1885. Walter S. Harsha, clerk.

3 *Rule to Plead.*

The Circuit Court of the United States for the Eastern District of Michigan.

D. M. FERRY & Co., a Corporation, *vs.* WILLIAM LIVINGSTONE, Jr.

JAN'Y 29, 1885.

On filing declaration as commencement of suit, and on motion of Otto Kirchner, Esq., pl'ff's att'y, ordered that said defendant do appear and plead to said declaration in twenty days after service upon him of a copy of said declaration and notice of this rule of judgment, &c.

OTTO KIRCHNER, *Pl'ff's Att'y.*

4 *Bill of Particulars.*

The Circuit Court of the United States for the Eastern District of Michigan.

D. M. FERRY & Co. *vs.* WILLIAM LIVINGSTON, Jr.

To the above-named defendant and to Hon. S. M. Cutchen, his att'y:

You will please to take notice that the following is a bill of particulars of the plaintiff's demand, and that the same is served in accordance with section 3012 of the Revised Statutes of the United States, to wit:

The sum of five hundred and sixty-three dollars paid by plaintiff to defendant under protest, for duties unlawfully imposed upon certain merchandise imported by the plaintiff as hereinafter stated, and interest upon said sum from the time of payment.

The name of the importer of the merchandise is D. M. Ferry & Co., a corporation. The merchandise imported consists of several packages of beet seeds, cabbage seeds, turnip seeds, Swiss chard seeds, and mangel wurzel seeds, each marked F. Y & Co., Y. A. L.

The city of Bremen, in Germany, is the place from which said merchandise was imported by the steamship France, and from New York to Detroit under bond 15838. The date of invoice—numbered 19712—is Paris, November 8th, 1884, and the Consular certificate thereto is dated November 17th, 1864, at Paris. The date of the entry at the custom house is December 17th, 1884. The amount of duty claimed to have been exacted in excess is the sum of $563.00, as follows:

Upon mangel wurzel seeds	$312 80
Upon beet seeds	127 00
Upon cabbage seeds	100 80
Upon turnip seeds	19 80
Upon Swiss chard seeds	12 60
Making in all	$563 00

The date of the payment of said duties is the twenty-fourth day of December, 1884. Said payment was made under protest in writing, made at the time of said payment, and another protest was filed against the exaction thereof on said 24th day of December, 1884, and the date of decision of said appeal by the Secretary of the Treasury is the 19th day of January, A. D. 1885.

Yours, &c.,

OTTO KIRCHNER,
Pl'ff's Att'y.

Endorsed: 7172. U. S. circuit court eastern district Michigan. D. M. Ferry & Co. *vs.* William Livingston, Jr. Bill of particulars. Filed Feb'y 11, 1885. Walter S. Harsha, clerk.

5 *Plea.*

In the Circuit Court of the United States for the Eastern District of Michigan.

STATE OF MICHIGAN:

D. M. FERRY & Co. *vs.* WILLIAM LIVINGSTON, Jr.

The defendant, by S. M. Cutcheon, his attorney, comes and demands a trial of the matters set forth in the plaintiff's declararion.

S. M. CUTCHEON,
Attorney for Defendant.

Endorsed: No. 7172. Circuit court of the United States for the eastern district of Michigan. D. M. Ferry & Co. *vs.* William Livingston, Jr. Plea. S. M. Cutcheon, attorney for defendant. Filed this 11 day of February, A. D. 1885. Walter S. Harsha, clerk.

6 *Waiver of Jury.*

The Circuit Court of the U. S., Eastern District of Michigan.

D. M. FERRY & Co. *v.* WILLIAM LIVINGTSON, Jr., Collector.

A jury is hereby waived.
Feb'y 27, '85.

OTTO KIRCHNER,
Pl'ff's Att'y.
S. M. CUTCHEON,
Defendant's Attorney.

Endorsed: 7172. U. S. circuit, eastern dist. Mich. D. M. Ferry & Co. *vs.* Wm. Livingstone, Jr. Waiver of jury. Filed February 27th, 1885. Jno. Graves, dep'y clerk.

7 *Tried and Submitted.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court-room, in the city of Detroit, on Friday, the twenty-seventh day of February, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

D. M. FERRY & Co. *vs.* WILLIAM LIVINGSTONE, Jr., Collector.

In this cause the parties having waived a jury in writing, and said cause having been brought on for trial before the court, the said court hears the proofs and allegations of the parties, and arguments of counsel, and thereupon said cause is submitted.

8 *Judgment.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment

at the district court-room, in the city of Detroit, on Monday, the twenty-seventh day of April, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

D. M. FERRY & COMPANY *vs.* WILLIAM LIVINGSTONE, Jr., Collector.

This cause having been heretofore tried before the court without a jury and submitted, and due deliberation having been thereupon had, the said court now here finds that the said defendant did undertake and promise in manner and form as the said plaintiff hath in its declaration in this cause complained against it, and assesses the plaintiff's damages on occasion of the premises at the sum of three hundred and thirty-two dollars; thereupon on motion of Otto Kirchner, attorney for the plaintiff, it is considered that the said plaintiff do recover against the said defendant its damages aforesaid, and that said plaintiff have execution therefor.

9 *Special Findings.*

The Circuit Court of the United States for the Eastern District of Michigan.

D. M. FERRY & COMPANY *vs.* WILLIAM LIVINGSTON, Jr.

This cause having been tried before me, Henry B. Brown, district judge of the eastern district of Michigan, without a jury, I do, and at the request of the parties of this suit, make the following findings of fact:

1. That trial by jury was duly waived in writing.

2. That heretofore, to wit, on the seventeenth day of December, A. D. 1884, at Detroit, in said district, the plaintiff did enter for importation a large quantity of mangel wurzel seeds, of the value of one thousand five hundred and sixty-four dollars; that the defendant was then and there collector of customs of the district of Detroit, in said district, and did then and there, by color of his authority as such collector, ascertain and impose the sum of three hundred and twelve $\frac{80}{100}$ dollars as a duty upon said mangel wurzel seeds.

3. That the plaintiff did then and there insist and protest to said defendant that said ascertainment and imposition of said duty was wholly without warrant of law, and did then and there demand possession of said seed, which was refused.

4. That afterward, and on the twenty-fourth day of December, A. D. 1884, in order to obtain possession of said mangel wurzel seeds imported by him as aforesaid, the plaintiff paid to said defendant the sum of three hundred and twelve $\frac{80}{100}$ dollars under protest, which said protest was in writing and signed by plaintiffs and its agents in that behalf, and was made and delivered to said defendant at the time of said payment, and set forth distinctly and specifically the grounds of objection to the amount claimed.

5. That afterwards, and on the 30th day of December, A. D. 1884, the plaintiff did, in due and regular form of law, make and perfect

his appeal from said ascertainment and liquidation to the Secretary of the Treasury, the plaintiff having made all protest and taken all steps required by law to entitle it thereto and to make the same effective, and afterwards, and on the 19th day of January, A. D. 1885, the said Secretary of the Treasury did overrule such appeal and affirm such ascertainment and liquidation of said duty.

6. That heretofore, to wit, on the 17th day of December, A. D. 1884, at Detroit, in said district, the plaintiff did enter for importation a large quantity of beet seed, of the value of sixteen hundred and thirty-five dollars; a large quantity of cabbage seeds, of the value of five hundred and four dollars, and a large quantity of turnip seeds, of the value of ninety-nine dollars; that the defendant was then and there collector of customs of the district of Detroit, in said district, and did then and there, by color of his author-
10 ity as such collector, ascertain and impose the sum $127 as a duty upon said beet seeds, and the further sum of $100.80 as duty upon the said cabbage seed, and the further sum of $19.80 as a duty upon the said turnip seed, making in all the sum of two hundred and forty-seven dollars and sixty cents imposed as a duty by said defendant upon said several seeds.

7. That the plaintiff did then and there insist and protest to said defendant that said ascertainment and imposition of said duty was wholly without warrant of law, and did then and there demand possession of the said seeds, which was refused.

8. That afterwards and on the 24th day of December, A. D. 1884, in order to obtain possession of said several seeds imported by the plaintiff as aforesaid, the plaintiff did pay to said defendant the sum of two hundred and forty-seven dollars and sixty cents under protest, which said protest was in writing, signed by the plaintiff and its agents in that behalf, and was made and delivered to said defendant at the time of said payment, and set forth distinctly and specifically the ground of objection to the amount claimed; and afterwards, and on the 13th day of December, A. D. 1884, the plaintiff did in due and regular form of law make and perfect an appeal from said ascertainment and liquidation to the Secretary of the Treasury, said plaintiff having made all protests and taken all steps required by law to entitle said plaintiff thereto and to make the same effective; and afterwards, and on the 19th day of January, A. D. 1885, the said Secretary of the Treasury did overrule said appeal and affirm said ascertainment and liquidation of said duty.

9. That beets, except sugar beets, are almost altogether raised from seeds of the kind in the declaration mentioned in gardens for the table, although they are also raised in fields for cattle to a limited extent.

10. That mangel wurzels are cultivated wholly in fields from seeds of the kind in the declaration mentioned, and not in gardens, and they are not used as for food for man, but for cattle.

11. That turnips are largely raised from seed of the kind in the declaration mentioned in fields for cattle and comparatively small quantity are also raised in gardens for the table, the proportion be-

ing at least twenty to one. Most of those consumed on the table are raised in fields.

12. That cabbages are cultivated from seeds of the kind in the declaration mentioned in fields as well as in gardens. They are used to a small extent as food for cattle, but to a much larger extent as food for man.

13. That turnip seeds, beet seeds, and cabbage seeds generally are and have been catalogued by prominent seedsmen in America, England, and Germany both as garden and agricultural seeds.

And from the foregoing facts I find the following conclusions of law:

1. That the turnip seeds and mangel wurzel seeds in the declaration mentioned are not garden seeds, and were not at the time they were entered for importation as aforesaid, and said duties were exacted thereon, subject to the payment of any duty whatever.

11 2. That the cabbage and beet seeds in the declaration mentioned are garden seeds, and were at the time they were entered for importation as aforesaid, subject to the payment of the duty exacted thereon.

3. That the plaintiff is entitled to have and receive of and from the defendant the sum of $332.60.

And the said defendant did duly except to the conclusion of law first above mentioned, and the plaintiff did duly except to the conclusions of law second above mentioned.

HENRY B. BROWN.

Endorsed: 7172. U. S. circuit court eastern dist. Mich. D. N. Ferry & Co. *vs.* Wm. Livingston, Jr. Special findings filed April 27, 1885. Walter S. Harsha, clerk.

12 *Opinion of District Judge Brown.*

The Circuit Court of the United States for the Eastern District of Michigan.

D. M. FERRY & Co. *vs.* WILLIAM LIVINGSTON, Jr., Collector.

This was an action to recover back certain duties claimed to have been illegally exacted by the defendant while acting as collector of customs of the port of Detroit.

Plaintiff, a corporation largely engaged in the importation and sale of seeds, imported a lot of beet, cabbage, turnip, and mangel wurzel seeds, which defendant, acting under the instructions of the Treasury Department, claimed were subject to a duty of 20 per cent. as garden seeds. Plaintiff thereupon paid, under protest, the following amounts, and brought suit to recover them back: Upon beet seeds, $127; cabbage, $100.80; turnip, $19.80; mangel wurzel, $312.80.

This case depends upon the construction to be given to two clauses of the tariff act of 1883, the first of which provides—vol. 22, p. 513—that "garden seeds, except seed of sugar beet," shall pay a duty of 20 per centum ad valorem, and the second of which, p. 520, puts upon the free list "plants, trees, shrubs, and vines of all kinds not

otherwise provided for, and seeds of all kinds except medicinal seeds not specially enumerated or provided for in this act."

Plaintiff's first contention is that these clauses are so repugnant to each other that the last must be taken as repealing the first, and admitting free of duty seeds of all kinds except non-enumerated medicinal seeds. In support of this view we are referred to the case of Powers *v.* Barney, 5 Blatchf., 202, in which it was held by Mr. Justice Nelson that the 19th section of the tariff act of 1861, imposing a duty of ten per cent. upon the articles enumerated in it, and among others "Peruvian bark," was repealed by the 23d section, which exempted the articles enumerated in it, also embracing "Perubian bark" in the list. This authority, however, is not controlling. Here was a plain repugnance between two provisions. Both could not possibly stand together, and the well-settled rule of construction was applied that the last provision should prevail as speaking the latest and final intent of the law-makers. In the case under consideration there is undoubtedly a repugnance if the last clause is construed as if it read "seeds of all kinds except non-enumerated medicinal seeds; and this reading undoubtedly derives some support from the fact that there is no comma after the words "medicinal seeds;" but I think there is a twofold answer to this proposition.

1. If a right be given or a duty imposed by particular words of a statute the subsequent use of general words will not be construed as taking away such right or duty. Sedgwick on Statutory Law, 423; Andree *v.* Fletcher, 2 T. R., 164; Churchill *v.* Crease, 5 Bing., 180; Pretty *vs.* Solly, 26 Beavan, 606; Sandeman *v.* Breach, 7 B. and C., 26. "Garden seeds" having been specially mentioned in the earlier clause, the subsequent exemption of seeds of all kinds should be construed as if garden seeds were excepted from such exemption.

2. If a comma be inserted after the words "medicinal
13 seeds" all pretence of repugnancy will disappear. The free list will then include only "seeds of all kinds," except medicinal seeds, "not specially enumerated." Such, I have little doubt, is the correct reading of the clause. If the comma be omitted, not only are all seeds exempted, except non-enumerated medicinal seeds, but these last are left unprovided for. On the one hand they are subjected to no duty as seeds generally, and they are excepted as medicinal seeds from the free list. If taxable at all, they would only be as other non-enumerated articles are. I do not think this could have been the intention of Congress. In the construction of statutes punctuation is of the slightest value. Commas and other marks are inserted or disregarded whenever the obvious intent of the Legislature requires it. Incorrect punctuation is so common, and the rules of punctuation differ so much with different authors, that it is only in rare instances it is suffered to turn the scale. Gygers Estate, 65 Pa., 311; Cushing *v.* Worrick, 9 Gray, 382; Hamilton *v.* Steamboat R. B. Hamilton, 16 Ohio St., 428; U. S. *v.* Rossvalley, 3 Bell, 157.

In the case of Ewing *v.* Burnett, 11 Pet., 41, 54, it was said by Mr. Justice Baldwin, speaking for the Supreme Court, that "punctuation

is a most fallible standard by which to interpret a writing. It may be resorted to when all other means fail; but the court will first take the instrument by its four corners in order to ascertain its true meaning. If that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it."

Treating, then, garden seeds as subject to a duty of 20 per cent., we are led to inquire what kinds of seeds are embraced by this term. The narrowest definition to which our attention has been called is, "that they are those seeds from which are raised, in the growing season of the year, the vegetable products, which, before complete maturity, are used upon the table as part of the customary food of mankind, and in distinction from those seeds which, sowed or planted on a broader scale in the fields, produce the vegetables which are stored for winter use as food." This definition would include such vegetables as the asparagus, broccoli, cauliflower, celery, cucumber, egg plant, lettuce, okra, rhubarb, radish, salsify, and tomato. But we think the exception of the sugar beet from dutiable seeds is very significant in this connection, and indicates clearly not only that other edible beets are regarded as garden products, but that other vegetables of like nature were intended to be so treated, though raised for consumption during the winter.

Upon the whole, we think that under this statute all seeds which fulfill the two following requirements must be classed as garden seeds: 1. They must be such as are commonly, though not universally, sown or planted in gardens. 2. Their products must be used as food for man.

14 The want of the first requirement would clearly exclude the potato, though this is ordinarily propagated by shoots or eyes, corn, and all cereals, since they are usually raised in the field. The want of the second would as clearly exclude the mangel wurzel, which is believed to be raised almost exclusively as food for cattle, as well as the seeds of all herbs, which, though intended for the use of man, are not consumed as food. Cabbages, though sometimes raised in fields and fed to cattle, are not ordinarily so, and, in the absence of any showing that the seed belongs to a variety which is intended for consumption by cattle, should be considered as a garden seed. The catalogues of prominent seed growers in America, England, and Germany, produced by counsel, show that turnip seeds, as well as cabbages and some others, are classified both as garden and as agricultural seeds; but in this country, at least, turnips are largely raised in fields for cattle, as a second crop, and are comparatively little used upon the table, and very rarely raised in gardens. We think they should be classed as agricultural products.

We think that if, from the language of the statute, there be a reasonable doubt whether certain specified articles are subject to duty, that those doubts should be resolved in favor of the importer. It is said, in Dwarris on Statutes, to be "a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language. Acts of Parliament which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed. When there is any

ambiguity found, the construction must be in favor of the public, because it is a general rule that where the public are to be charged with a burden, the intention of the Legislature to impose that burden must be explicitly and distinctly shown." Mr. Justice Story, in giving reasons for holding that the revenue act of 1841 did not intend to levy a certain duty upon indigo, says: "My reasons for this conclusion are these: In the first place, it is, as I conceive, a general rule in the interpretation of all statutes levying taxes or duties upon subjects or citizens not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation, so as to embrace things not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import." (U. S. *v.* Wigglesworth, 2 Story, 369, 373; Cooley on Taxation, 200–208; Adams *v.* Bancroft, 3 Sum., 384; Wilkinson *v.* Greely, 1 Curt., 140.)

We have not overlooked, in this connection, the many expressions of the Supreme Court to the effect that revenue laws are not penal laws in the sense that requires them to be construed strictly, but are rather remedial in their character, and to be interpreted liberally, to carry out the purposes of their enactment. (Taylor
15 *v.* U. S., 3 How., 197; Cliquot's Champagne, 3 Wall., 114, 145; U. S. *v.* Hodson, 10 Wall., 395. This language, however, is used with reference to remedies under the revenue laws and the penalties attached to their violation. It has no application, as we conceive, to statutes designating the subjects of taxation.

It follows that plaintiff is entitled to recover the sum of $332.60, duties collected upon the turnip and mangel wurzel seeds.

16 *Plaintiff's Præcipe for Writ of Error.*

The Supreme Court of the United States:

The clerk of the circuit court of the United States for the eastern district of Michigan will please to issue a writ of error at the suit of D. M. Ferry & Co., plaintiff in error, directed to the said the circuit court of the United States for the eastern district of Michigan, to remove the records, proceedings, and the giving of judgment in a certain cause therein, wherein the said D. M. Ferry & Co. is plaintiff and William Livingston, Jr., is defendant, according to the rules and practice of this court. And dated this 29th day of May, A. D. 1885.

OTTO KIRCHNER,
For Pl'ff in Error.

Endorsed: 7172. United States Supreme Court. D. M. Ferry & Co., pl'ff in error; William Livingston, Jr., def't in error. Præcipe for writ of error to U. S. circuit court, eastern dist. Mich. Filed May 29, 1885. Walter S. Harsha, clerk.

17 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Michigan, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between D. M. Ferry & Company, plaintiff, and William Livingston, Jr., collector, defendant, a manifest error hath happened, to the great damage of the said D. M. Ferry & Company, plaintiff, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the Said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 29th day of May, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States for Eastern District of Michigan.

Allowed by—

HENRY B. BROWN.

18 The United States of America to William Livingstone, Jr., Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, and in a suit wherein D. W. Ferry & Co. is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error stated, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court, this twenty-ninth day of May, in the year of our Lord one thousand eight hundred & eighty-five.

HENRY B. BROWN,
Dist. Judge.

OTTO KIRCHNER,
Att'y for Def't in Er.

18½ I hereby acccept service of the within citation this twenty-ninth day of May, A. D. 1885.

SULLIVAN M. CUTCHEON,
Attorney for Defendant in Error, United States Attorney for the Eastern District of Michigan.

[Endorsed:] 7172. U.S. Supreme Court. D. M. Ferry & Co., pl'ff in error, *vs.* William Livingston, Jr., def't in error. Citation (pl'ff). Filed May 29, 1885. Walter S. Harsha, clerk. Otto Kirchner, att'y for pl'ff in error.

19 *Bond on Writ of Error.*

Know all men by these presents that we, D. M. Ferry & Co., principal, and Lem. W. Bowen, as surety, both of Detroit, Wayne county, Michigan, are held and firmly bound unto William Livingston, Jr., in the penal sum of five hundred dollars, for which payment, well and truly to be made, we bind ourselves and each of us firmly by these presents.

Sealed with our seals and dated this 29th day of May, A. D. one thousand eight hundred and eighty-five.

Whereas in a suit pending in the circuit court of the United States for the eastern district of Michigan, wherein the said D. M. Ferry & Co. is plaintiff, and the said William Livingston, Jr., is defendant, a judgment was rendered by said court, and whereas the said D. M. Ferry & Co. has issued a writ of error out of the Supreme Court of the United States to review all and singular the record, proceedings, and the giving of judgment in said cause:

Now, therefore, the condition of this obligation is such that if the said D. M. Ferry & Co. shall prosecute its writ to effect, and if it fail to make its plea good shall answer all damages and costs, then this obligation shall be void; otherwise to be and remain in full force and virtue.

D. M. FERRY & CO.,
[CORPORATE SEAL.] By D. M. FERRY, *Pres.*
LEM. W. BOWEN. [L.S.]

Approved—

H. B. BROWN.

Endorsed: 7172. Supreme Court of the U. S. D. M. Ferry & Co., pl'ff in error, *vs.* William Livingston, Jr. Bond on citation. Filed May 29, 1885. Walter S. Harsha, clerk. Otto Kirchner, att'y for pl'ff in error.

20 *Defendant's Præcipe for Writ of Error.*

The Supreme Court of the United States.

The clerk of the circuit court of the United States for the eastern district of Michigan will please to issue a writ of error at the suit of William Livingston, Jr., plaintiff in error, directed to the said the circuit court of the United States for the eastern district of Michigan, to remove the records, proceedings, and the giving of judgment in a

certain cause wherein D. M. Ferry & Co. is plaintiff and said William Livingston, Jr., is defendant, according to the rules and practice of this court. And dated this 29th day May, A. D. 1885.

S. M. CUTCHEON,
United States Attorney for the Eastern District of Michigan,
Attorney for Plaintiff in Error.

Endorsed: 7172. D. M. Ferry & Co. Wm. Livingston, Jr., collector. Def't's præcipe for writ of error. Filed May 29, 1885. Walter S. Harsha, clerk.

21 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Michigan, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between D. M. Ferry & Company, plaintiff, and William Livingstone, Jr., collector, defendant, a manifest error hath happened, to the great damage of the said William Livingstone, Jr., collector, defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 29th day of May, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States
for Eastern District of Michigan.

Allowed by—
HENRY B. BROWN.

22 The United States of America to D. M. Ferry & Co., Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, and in a suit wherein William Livingston, Jr., is plaintiff in error and you are defendant in error, to show cause, if any there be, why *why* the judgment rendered against the

said plaintiff in error, as in said writ of error stated, should not be corrected, and show why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief [Justice] of the said Supreme Court, the 29th day of May, in the year of our Lord one thousand eight hundred & eighty-five.

HENRY B. BROWN,
Dist. Judge.

23 I do hereby accept service of the within citation May 29th, 1885.

OTTO KIRCHNER,
Att'y for Pl'ff in Error.

[Endorsed:] 7172. Citation (def'ts). Filed May 29, 1885. Walter S. Harsha, clerk.

24 *Clerk's Certificate.*

THE UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify and return to the writs of errors sued out by the plaintiff and defendant in the case of D. M. Ferry & Co. *vs.* William Livingston, Jr., collector, in said court, that the above and foregoing is a true copy of the record and proceedings of said court in said cause; that I have compared the same with the original, and it is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this tenth day of June, in the year one thousand eight hundred and eighty-five, and of the Independence of the United States of America the one hundred and ninth.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA, *Clerk.*

25 The Supreme Court of the United States.

D. M. FERRY & Co., Plaintiff in Error,
v.
WILLIAM LIVINGSTON, JR., Defendant in Error.

Now here comes the said D. M. Ferry & Co., plaintiff in error, by Otto Kirchner, its attorney, & says that in the record, proceedings, & in the giving of judgment herein there is manifest error, in this:

1. The court below erred in finding as a conclusion of law from the fact found that cabbage seeds are garden seeds, and, as such, subject to the payment of a duty of twenty per cent. ad valorem.

2. That the court below erred in finding as a conclusion of law from the fact found that beet seeds are garden seeds, and, as such, subject to the payment of a duty of twenty per cent. ad valorem.

3. That the court below erred in finding as a conclusion of law that, on the fact found, the plaintiff was not entitled to recover the sum exacted by the defendant as a duty upon the cabbage seeds imported by it.

4. That the court below erred in finding as a conclusion of law
that, on the fact found, the plaintiff was not entitled to re-
26 cover the sum exacted by the defendant as a duty upon the
beet seeds imported by it.

Wherefore the plaintiff in error prays that so much of said judgment as is supported by said findings may be set aside, & that a judgment may be rendered in his favor, & that he may be restored to all things he has lost by reason of said judg'nt.

OTTO KIRCHNER,
Att'y for Pl'ff in Error.

27 I do hereby accept service of the within assignment of errors, this 29th day of May, A. D. 1885.

SULLIVAN M. CUTCHEON,
United States Attorney for the Eastern District of Michigan, Attorney for Defendant in Error.

[Endorsed:] U. S. Supreme Court. D. M. Ferry & Co. *vs.* W. Livingston, Jr. Assignment of error. Filed May 29, 1885. Walter S. Harsha, clerk. Otto Kirchner.

28 The Supreme Court of the United States.

WILLIAM LIVINGSTONE, Jr., Plaintiff in Error,
vs.
D. M. FERRY & Co., Defendant in Error.

Now here comes the said William Livingstone, Jr., plaintiff in error, by S. M. Cutcheon, United States attorney for the eastern district of Michigan, his attorney, and says that in the record and proceedings aforesaid and in the giving of judgment aforesaid there is manifest error in this:

1. That the court below erred in finding as a conclusion of law from the facts found that mangel wurzel seeds are not garden seeds, and were not at the time they were entered for importation and duties exacted therefrom by plaintiff in error subject to the payment of any duty whatever.

2. That the court below erred in finding as a conclusion of law from the facts found that turnip seeds are not a garden seed, and were not at the time they were entered for importation and duties exacted thereon by the plaintiff in error subject to the payment of any duty whatever.

3. That the facts found in this cause do not support the judgment entered therein.

Wherefore the plaintiff in error prays that so much of said judg-

ment as is not supported by the facts found may be set aside, and that a judgment may be rendered in his favor, and that he may be restored to all things which he hath lost by occasion of the said judgment.

S. M. CUTCHEON,
United States Attorney for the Eastern District of Michigan,
Attorney for Plaintiff in Error.

29 I do hereby accept service of the within assignment of errors, this 29th day of May, A. D. 1885.

OTTO KIRCHNER,
Att'y for Def't — Error.

[Endorsed:] U. S. Supreme Court. Wm. Livingstone, Jr., pl'ff in error, *v.* D. M. Ferry & Co., def't in error. Ass'g't of errors. Filed May 29, 1885. Walter S. Harsha, clerk. S. M. Cutcheon, U. S. att'y.

Endorsed on cover: E. Michigan C. C. U. S. No. 875. D. M. Ferry & Company, plaintiffs in error, *vs.* William Livingston, Junior, Collector of Customs for the District of Detroit. And No. 876. William Livingston, Junior, Collector of Customs for the District of Detroit, plaintiff in error, *vs.* D. M. Ferry & Company. Filed July 9, 1885.

115-542

Office Supreme Court U. S.
FILED.
OCT 24 1885
JAMES H. McKENNEY,
CLERK.

BRIEF FOR D. M. FERRY & CO.

THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 875.

WILLIAM LIVINGSTONE, JR., PLAINTIFF IN ERROR.

VS.

D. M. FERRY & CO., DEFENDANT IN ERROR.

No. 876.

D. M. FERRY & CO., PLAINTIFF IN ERROR,

VS.

WILLIAM LIVINGSTONE, JR., DEFENDANT IN ERROR.

THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 875.

WILLIAM LIVINGSTONE, JR., PLAINTIFF IN ERROR.

vs.

D. M. FERRY & CO., DEFENDANT IN ERROR.

No. 876.

D. M. FERRY & CO., PLAINTIFF IN ERROR,

vs.

WILLIAM LIVINGSTONE, JR., DEFENDANT IN ERROR.

BRIEF FOR D. M. FERRY & CO.

Statement of the Case.

D. M. Ferry & Co. is a corporation. It is largely engaged in the importation, cultivation and vending of seeds.

William Livingstone, Jr., is the Collector of Customs at the port of Detroit, and he was such collector at the time of the transactions out of which this suit grew.

On the 17th day of December, 1884, Ferry & Co. imported a quantity of mangel wurzel seed of the value of $1,564; a quantity of beet seeds of the value of $635; a large quantity of cabbage seeds of the value of $504; and a quantity of turnip seeds of the value of $99, upon which Mr. Livingstone, as collector of the port of Detroit, where said seeds were entered, exacted an *ad valorem* duty of twenty per cent. He based such exaction upon the alleged ground that the seeds were all garden seeds, within the meaning of "An act to reduce inter-"nal revenue taxation, and for other purposes." Approved March 3, 1883. (U. S. Statutes at Large, vol. xxii.)

Section 2502 of the act (p. 491) provides:

"There shall be levied, collected and paid upon all articles imported "from foreign countries, and mentioned in the schedules herein con- "tained, the rates of duty, which are by the schedules respectively pre- "sented, namely:

* * * * * * * *

"Schedule N, 'Sundries' (p. 513), Garden seeds, except seed of the "sugar beet, twenty per centum *ad valorem*."

Section 2503 (p. 514) provides:

The following articles when imported shall be free from duty:

* * * * * * * *

P. 520. "Plants, trees, shrubs and vines of all kinds, not otherwise "provided for, and seeds of all kinds except medicinal seeds not "specially enumerated or provided for in this act."

Ferry & Co. insisted that the seeds were not subject to the duty exacted thereon, that they were not garden seeds within the meaning of the act, and that they were free from duty under that part of Section 2503 above quoted.

In order to obtain possession of the goods D. M. Ferry & Co. paid the duties so exacted under protest made in writing at the time of said payment, in conformity with the provisions of law. D. M. Ferry & Co. thereupon perfected its appeal, from the ascertainment of said duty by the Collector, to the Secretary of the Treasury, who affirmed the action of the collector.

Thereupon D. M. Ferry & Co. brought its action under Section 3011 of the Revised Statutes to recover the taxes so exacted.

The case came on to be tried by the court without a jury. The court found specially all the facts above stated, and also:

(*a.*) That beets, except sugar beets, are almost altogether raised from seeds of the kind in the declaration mentioned, in gardens, for the table, although they are also raised in fields for cattle, to a limited extent.

(*b.*) That mangel wurtzels are cultivated wholly in fields from seeds of the kind in the declaration mentioned, and not in gardens, and they are not used as food for man, but for cattle.

(*c.*) That turnips are largely raised from seed of the kind in the declaration mentioned, in fields for cattle, and comparatively small quantities are also raised in gardens for the table, the proportion being at least twenty to one. Most of those consumed on the table are raised in fields.

(*d.*) That cabbages are cultivated from seeds of the kind in the declaration mentioned, in fields, as well as in gardens. They are used to a small extent as food for cattle, but to a much larger extent as food for man.

(*e.*) That turnip seed, beet seed and cabbage seed generally, are and have been catalogued by prominent seedsmen in America, England and Germany, both as garden and agricultural seeds.

From these facts the Circuit Court found the following legal conclusions.

(1.) That the turnip and mangel wurzel seeds were not garden seeds within the meaning of the act, and that Ferry & Co. was entitled to recover the duties exacted thereon.

(2.) That cabbage and beet seeds are garden seeds within the meaning of the act; that the duty was properly exacted, thereon, and that Ferry & Co. was not entitled to recover the same.

Both sides bring error.

Each party alleges in substance that the conclusions of law are not supported by the facts found.

The only question presented by the record is whether the enumerated seeds properly fall under the classification of garden seeds within the meaning of the tariff act above recited.

Before entering upon a discussion of the question, I deem it proper to call the attention of the court to the decision of the treasury department upon it

On the 27th day of November, 1883, Acting Secretary French addressed a letter to the collector of customs at Rochester, N. Y., in which he stated "that the department regards seeds such as * * * "cabbage, * * * turnips * * * belong to the category of "*agricultural seeds which are not garden seeds.*"

He further stated in conclusion: "It is impossible to enumerate all "the seeds which belong to either of these divisions in detail, and the "above is given for information as to the principle upon which "collectors of customs must act."

The letter was published among the "decisions of the Treasury "Department for the month of November, 1883, upon the construc- "tion to be given to the acts of Congress relating to the tariff * * * "and for the guidance of officers of customs and others concerned," and is numbered 6046.

The Treasury Department and the importers, as well as all others concerned, acted upon this decision until November 8, 1884, when Assistant Secretary French issued a circular (Department No. 167, Division of Customs), in the fifth subdivision of which it is stated that "beet, carrot, cabbage, onion and turnip seeds are regarded as being "within the category of garden seeds, dutiable at twenty per cent *ad* "*valorem.*"

Reference is made in the circular to the letter of the Department to the collector at Rochester, N. Y. (Nov. 7th, 1884, No. 6635), in which it is stated that "while the Department did not, by its circular of "March 28, 1884 (synopsis 6278), include beet, carrot, cabbage, onion "and turnip seeds in the category of garden seeds dutiable at the rate "of twenty per centum *ad valorem*, the principles of the decision last "referred to embrace the seeds above specified."

The decision of March 28, 1884, was that beans were garden seeds subject to a duty of twenty per cent *ad valorem* under the tariff act of 1883. It proceeds upon the argument that because the act in terms excepts the seed of the sugar beet from its provisions, imposing a duty upon "garden seeds," it must be taken that when it specified "garden seeds," Congress had in mind seeds like those of the sugar beet.

While I do not object to the result reached by the court below, so far as it relates to the duties exacted upon turnip and mangel wurzel seeds, I submit, with very great deference to the learned District Judge, that the ground of his opinion is altogether too narrow and artificial.

I.

Prior to the enactment of the Tariff Act of 1883 a commission had been appointed to revise the customs tariff. The act complements the report of the commission, and in a sense forms part of it. In case of doubtful construction this report is entitled to serious consideration.

The phrase "garden seeds" is not of definite import. No lexicographer has undertaken to define it. It forms the headlines to pages 2253–7 of the Tariff Commissioners' Report. The only clue to its meaning is found in the testimony of Mr. Landreth (p. 2254, vol. II.), which is as follows:

Q. You mention in the paper to which you have referred on all garden and field seeds, excepting grass and grain seeds?

A. Yes, sir.

Q. What would you include under the head of field seeds except grain and grasses; I mean outside of garden seeds?

A. I would include corn, for instance.

Q. You speak of field seeds outside of grains and grasses as distinguished from garden seeds?

A. Garden seeds, under the common acceptation of the term, are seeds grown on the limited areas; agricultural seeds are seeds grown out in the fields. They sometimes are synonymous terms. For instance, a turnip seed is both a garden seed and an agricultural seed; a mangel wurzel is both a garden and an agricultural seed. When grown for the table it is a garden seed, and when grown for feeding cattle it is an agricultural seed.

Q. It would all come in as turnip seed, would it not?

A. Yes, sir; but we did that to cover the matter entirely. Otherwise *if the classification simply describes the article as a garden seed bearing a duty, it might be imported as an agricultural seed free of duty.*

By Commioner Ambler:

Q. If you should happen to get two rates on such, how do you find which rate it should pay?

A. That is what we wish to guard against. My present specification calls for 50 per cent on all seeds except grasses and grains. * *

The difficulties which might grow out of the classification of any particular class of seeds as "garden seeds" are thus clearly pointed out. Accordingly the commission by its report, Vol. 1, pp 78–80, recommended a schedule which by a different classification steers clear of any ambiguity.

The congress did not adopt the classification recommended by the commission, yet it had before it a report from which it appeared by the only testimony reported on the point, that "under a classification "simply describing the article as a garden seed bearing a duty, it (*i. e.*, a "seed cultivated in both field and garden) might be imported as an "agricultural seed free from duty," and it is fair to assume that the Congress made the classification with the consequences pointed out by this testimony fully in view.

"Garden seeds" pure and simple, then, must be held to mean seeds cultivated and sown in the garden, and not sown or cultivated in the field. This must be so from the very nature of things. The term "garden seeds," *ex vi termini*, implies that there are other seeds not garden seeds. All such seeds cultivated in the field are by the express terms of the act exempt from duty. Any other construction would lead to this; that seeds which are cultivated in both field and garden would at the same time be both on the free list and subject to the payment of a duty.

II.

The Act must be construed most favorably to the importer.

Mr. Justice Cooley in his work on Taxation, p. 201, says: "It is a "well settled rule of law that every charge upon the subject must be "imposed by clear and unambiguous language. Acts of parliament "which impose a duty upon the public will be critically construed "with reference to the particular language in which they are expressed. "When there is any ambiguity found *the construction must favor "the public, because it is a general rule that when the public are to be "charged with a burden, the intention of the legislature to impose "that burden must be explicitly and distinctly shown.* This state"ment of the general rule expresses the view which it is believed has "always prevailed in England; it is also that which has been adopted "in the several States. Like views have been frequently expressed by "the federal courts. Thus Mr. Justice Story, in giving reasons for

"holding that the Revenue Act of 1841 did not intend to levy a cer-
"tain permanent duty on indigo, says: My reasons for this conclu-
"sion are these: In the first place it is, as I conceive, a general rule,
"in the interpretation of all statutes *levying taxes and duties upon*
"*subjects or citizens not to extend their provisions by implication,*
"*beyond the clear import of the language used to enlarge their opera-*
"*tion so as to embrace matters not especially pointed out, although*
"*standing upon close analogy.* In every case, therefore, of doubt,
"such statutes are construed *most strongly against the government*
"and in favor of the subject or citizen, because burdens are not
"imposed nor presumed to be imposed, beyond what the statutes
"expressly and clearly import (2 Story, 269, 273). * * * * *
" * * * * * * * * Duties, it is said by Mr. Justice Nelson,
"are never imposed upon the citizen upon vague or doubtful inter-
"pretations."

Wilkinson *vs.* Greeley, 1 Curtis, 440, was an action against the collector of the port of Boston to recover money exacted by him under a claim that it was due for duties upon certain imported goods. The Tariff Act of 1846 imposed a duty of thirty per cent *ad valorem* upon "manufactures of wool," and admitted "blankets of all kinds" free of duty. On the trial it appeared that before the Tariff Act of 1846, various kinds of blankets were imported into the United States, among which were "Mackinaw blankets," under which name the merchandise in question was invoiced and entered by the plaintiffs at the custom house. The collector refused to pass them, and assessed upon them the *ad valorem* duty as manufactures of wool. The evidence tended to show that so far as respected the fabric and the processes of manufacture, these goods were substantially like certain species of coatings imported in pieces of twenty yards and upwards, under the name of Duffels, Petershams and Pilots.

The court, by Mr. Justice Curtis (p. 441), said: "When any officer
"of the government compels a citizen to pay a tax, he may be
"required to show that it was exacted by authority of law. The
"defendant must do so here, and he can do so only by satisfying you
"that these articles were not blankets within the meaning of the
"Tariff Act of 1846."

It is submitted, then, that in construing a revenue act, as between a citizen and the government, the rule that it shall be construed most strongly against the government is paramount, and the rule sought to be invoked by Secretary French, in his opinion of March 28th, must give way to it.

This view gains additional force from the fact that the free list manifests a clear intent to admit seeds generally free of duty. The *onus* of proving that a given case falls within the exception made by Schedule N rests upon the government.

III.

The exemption of the seeds of the sugar beet from the duty imposed on garden seeds does not control the meaning of the provision under consideration.

It may be argued that the views sought to be enforced by this brief would render the words "except the seed of the sugar beet," as found in Schedule N, useless.

Concede this to be so, and then what?

They were undoubtedly inserted by some anxious friend of the sugar beet industry, out of abundant caution.

The canon which requires force and effect to be given, if possible, to every word in a writing is not paramount. It is subject to that broader rule which looks to the purpose and intent of the enactment to "unlock its understanding."

The argument that the exemption of the seed of the sugar beet from the duty imposed on garden seeds indicates an intent on the part of Congress to embrace under the designation "garden seeds" seeds like those of the sugar beet, is equally fallacious.

Like the sugar beet in what respect?

In respect to the kind of the product, or, in respect to the manner of cultivation, whether in field or garden? If the former, it certainly can have no application to this case. If the latter, then the designation "garden seeds" embraces both field and garden seeds, a result which, it is plain, the Congress never contemplated. Besides, there would in that case be no scope for the operation of the free list unless the construction we seek to put upon it be correct.

It seems, then, that the rules of construction, the history of this legislation, and the inherent sense of the thing all lead to the conclusion that the phrase "garden seeds" as employed in the tariff act of 1883, must be held to exclude all seeds that are sown or cultivated in the field and known as agricultural seeds.

FINALLY.

Under a fair construction of the entire tariff act, all seeds except certain medicinal seeds especially enumerated, are free from duty.

Inasmuch as medicinal seeds form a classification by themselves, distinct from "garden seeds," it can not be claimed that they are embraced under this latter classification. It follows, then, that the "free list" under the classification, "seeds of all kinds," except certain

medicinal seeds, is comprehensive enough to embrace "garden seeds." This view is emphasized by the peculiar language of the provision. If it simply specified "all seeds," without more it might be argued that the very general language of the free list is necessarily qualified by the more specific language of the schedule (N). But there is no room for such an argument. The act *itself* declares that only "medicinal seeds not specially enumerated," or provided for, shall be excepted from the general designation, "seeds of all kinds," and it is not, therefore, competent by mere force of construction to supplement the act of Congress itself.

It may be argued that Congress can not have intended to place garden seeds under the general classification, "seeds of all kinds," upon the "free list." We reply that the history of the legislation shows that it is more reasonable to suppose that the introduction of the classification "garden seeds" in the schedule was the result of error, rather than the placing of "seeds of all kinds" upon the free list.

The tariff commission (Report, vol. 1, p. 73) reported the following classification for schedule:

"Plants, trees, shrubs and vines of all kinds not otherwise provided "for, and seeds of all kinds except medicinal seeds OR SEEDS not speci- "fically enumerated or provided for in this act, twenty per cent *ad* "*valorem*."

The Congress, instead of adopting this classification for the schedule, adopted it bodily for the free lists, except that it omitted the words "or seeds" after the words "medicinal seeds."

It will be seen at a glance that had it suffered the words "or seeds" to remain, the provision relating to "*garden seeds*" in the schedule would have remained undisturbed. By striking them out it wrought two substantial changes:

(*a*) They placed upon the free list only such medicinal seeds as are not otherwise specifically enumerated or provided for, whereas if the classification had been adopted without the omission of the words "or seeds" ALL medicinal seeds would have been placed upon the free list.

(*b*) They excepted only such medicinal seeds as were not otherwise specially enumerated or provided for from the sweeping language, "seeds of all kinds;" whereas if the classification had been adopted without the omission of the words "or seeds," "*all medicinal seeds*" and all other seeds not otherwise specifically enumerated or provided for by the act would have been excepted therefrom.

It can not be argued that the omission of these words is accidental, neither can they be supplied by construction. It is rather to be taken that the Congress had an object in view when it changed the classification reported to it by the commission.

In Potter's Dwarris on Statutes, p. 144, the following principle is laid down: "Statutes should be interpreted according to the most "natural and obvious import of their language, without resorting to "subtle or forced construction for the purpose either of limiting or "extending their operation. Courts cannot correct supposed errors, "omissions or excesses of the Legislature."

The provisions in the schedule and the free list being thus utterly repugnant, the former must give way to the latter, as being the last expression of the legislative will.

This is not only in accordance with rules of statutory construction, but in harmony with the decision of Mr. Justice Nelson in a parallel case, Power *et al.* vs. Barney, 5 Blatchford, 202. The act of March 2d, 1861 (12 U. S. Statutes at Large), provided that a duty of ten per cent. *ad valorem* shall be levied upon "Peruvian bark" (Sec. 19, p. 188), yet a subsequent section also (p. 193) provided that "bark, Peruvian or bark Quilla" shall be admitted free of duty. The court, by Mr. Justice Nelson, said: "In this difficulty of conflicting claims I know "of no other way of solving it than by applying the well settled rule "of construction in the case of two repugnant provisions of the same "act, which is that the last provision shall prevail as speaking the "latest and final intent of the law maker."

* * * * * * * * * * *

"Another principle may also be invoked, which in cases of serious "ambiguity in the language of the act or doubtful classification of "articles, the construction is to be in favor of the importer, as duties "are never imposed on the citizen upon vague or doubtful interpreta-"tions."

D. M. Ferry & Co. is, with one possible exception, the largest dealer in and importer of seeds in the United States. The principles of the decision of this court will be, to it, of far-reaching consequence. Its appeals to the Secretary of the Treasury from the exaction of duties by the Collector, involving many thousand dollars, are awaiting the issue of the case, for final adjudication.

The importance of the case and the exalted character of this tribunal lead me to hope for a careful consideration of the question involved.

OTTO KIRCHNER,
Counsel for D. M. Ferry & Co.

115-542

FILED
NOV 13 1885
JAMES H. MCKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

D. M. FERRY & CO., PLAINTIFFS IN ERROR,
vs.
WILLIAM LIVINGSTON, JR., COLLECTOR OF customs for the district of Detroit. } No. 875.

WILLIAM LIVINGSTON, JR., COLLECTOR OF Customs for the district of Detroit, Plaintiff in error,
vs.
D. M. FERRY & CO. } No. 876.

BRIEF FOR THE UNITED STATES.

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D. M. FERRY & CO. } No. 876.

BRIEF FOR THE UNITED STATES.

This suit was brought in the circuit court of the United States for the eastern district of Michigan by D. M. Ferry & Co. against William Livingston, jr., collector, to recover back certain duties claimed to have been illegally exacted by the defendant while acting as collector of customs of the port of Detroit. The case having been tried without a jury, the court, among other facts, found the following:

1. That on the 17th day of December, 1884, at De-

troit, the plaintiff entered for importation a large quantity of mangel-wurzel seeds of the value of $1,564; that the defendant was there and then collector of customs of the district of Detroit, in the said district, and did then and there, by color of his authority as such collector, impose the sum of $312.80 as a duty upon said mangel-wurzel seeds.

2. That on the 17th day of December, 1884, at Detroit, in said district, the plaintiff entered for importation a large quantity of beet seed, of the value of $1,635; a large quantity of cabbage seed, of the value of $504; and a large quantity of turnip seed, of the value of $99; that the defendant was then and there collector of customs of the district of Detroit in the said district, and did then and there, by color of his authority as such collector, impose the sum of $127 as a duty upon the said beet seeds, and a further sum of $100.80 as a duty upon said cabbage seeds, and a further sum of $19.80 as a duty upon the said turnip seeds; making in all the sum of $247.60 imposed by said defendant upon said several seeds.

3. That beets, except sugar-beets, are almost altogether raised from seeds of the kind in the declaration mentioned in gardens for the table, although they are also raised in fields for cattle to a limited extent.

4. That mangel-wurzels are cultivated wholly in fields from seeds of the kind in the declaration mentioned, and not in gardens, and they are not used as food for man, but for cattle.

5. That turnips are largely raised from seed of the kind in the declaration mentioned in fields for cattle, and comparatively small quantities are also raised in gardens for

the table, the proportion being at least twenty to one. Most of those consumed on the table are raised in fields.

6. That cabbages are cultivated from seeds of the kind in the declaration mentioned in fields as well as in gardens; they are used to a small extent as food for cattle, but to a much larger extent as food for man.

7. That turnip seeds, beet seeds, and cabbage seeds generally are, and have been, catalogued by prominent seedsmen in America, England, and Germany both as garden and agricultural seeds.

From the foregoing facts, the court found the following conclusions of law:

1. That the turnip seeds and mangel-wurzel seeds in the declaration mentioned are not garden seeds, and were not, at the time they were entered for importation as aforesaid and said duties were exacted thereon, subject to the payment of any duties whatever.

2. That the cabbage and beet seeds in the declaration mentioned are garden seeds, and were, at the time they were entered for importation as afore said, subject to the payment of the duty exacted thereon.

3. That the plaintiff is entitled to have and receive of and from the defendant the sum of $332.60.

Both the plantiff and the defendant duly excepted to the conclusions of law before mentioned, and sued out writs of error to the judgment of the court.

The question now presented involves the construction to be given to two clauses of the tariff act of 1883, the first of which provides (vol. 22, p. 513): "That garden seeds, except seed of sugar beet," shall pay a duty of 20 per centum ad valorem, and the second of which (page 520) puts upon the free list "plants, trees, shrubs, and

vines of all kinds not otherwise provided for, and seeds of all kinds except medicinal seeds, not specially enumerated or provided for in this act."

As to plaintiff's contention that these clauses are so repugnant to each other that the last must be taken as repealing the first, and admitting free of duty seeds of all kinds except non-enumerated medicinal seeds, we submit that it is not sustained by the authorities. The rule is well settled that repeals by implication are not favored, and are never admitted where the former can stand with the new act. In Wood *vs.* The United States (16 Peters, 342–362) Mr. Justice Story, speaking for the court upon the question of the repeal of the statute by implication, said:

> That it has not been repealed expressly or by direct terms is admitted, and the question resolves itself into the narrow inquiry whether it has been repealed by necessary implication. We say "necessary implication," for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it, for they may be merely affirmative or cumulative or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old is repealed by implication only *pro tanto* to the extent of the repugnancy.

In State *vs.* Stoll (17 Wallace, 425–430) the language of the court was that—

> It must appear that the latter provision is certainly and clearly in hostility to the former. If by any reasonable construction the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be.

It is clear, we think, that the intention of Congress, by inserting the provision quoted in the free list, was not to repeal the preceding clause, which imposed a duty of 20 per centum ad valorem upon "garden seeds, except seed of sugar beet." There is no repugnance between the two clauses, and both may stand together. "Garden seeds" having been made by the preceding clause subject to a duty of 20 per centum ad valorem, the subsequent exemption of "seeds of all kinds" should be construed as if "garden seeds" were excepted from such exemption.

The case of Power et al. *vs.* Barney (5 Blatchford, 202) referred to by the learned counsel on the other side is not a parallel one. In that case Mr. Justice Nelson decided that the nineteenth section of the tariff act of 1861, imposing a duty of 10 per cent. upon the articles enumerated in it (among others Peruvian bark) was repealed by the twenty-third section, which exempted the articles enumerated in it, also embracing Peruvian bark in the list. There was a necessary repeal by implication of the former section. The two sections could not possibly stand together, because there was a plain repugnance between their provisions. The difficulty could only be solved by applying the well settled rule of construction in the case of two repugnant provisions of the same act, which is, that the last provision shall prevail as speaking the latest and final intent of the law-maker. If a comma be inserted after the words "medicinal seeds" in the clause referred to, the difficulty will disappear entirely. Such, we think, is the proper punctuation, because it seems to be required by the obvious intent of Congress. If the comma be omitted, not only are all seeds exempted, except non-

enumerated "medicinal seeds," but these last are left unprovided for. On the one hand they are subjected to no duty as seeds generally, and they are excepted as "medicinal seeds" from the free list.

The attention of the court is specially invited to the views of the learned district judge on this branch of the case, to be found at page 8 of the record, and also to the authorities cited by him to establish the proposition that if a duty be imposed by the particular words of a statute, the subsequent use of general words will not be construed as taking away such duty. While it is undoubtedly true, as is contended on the other side, that in every case of doubt statutes are construed most strongly against the Government and in favor of the citizens, because burdens are not imposed nor presumed to be imposed beyond what the statutes expressly and clearly import, it is also true that, according to the judgment of this court as expressed in various decisions, revenue laws are not penal laws in the sense that requires them to be construed strictly, but are rather remedial in their character and to be interpreted liberally to carry out the purposes of their enactment.

Assuming, then, that "garden seeds" are subject to a duty of 20 per centum ad valorem, the next question to be considered is whether mangel-wurzel seeds, turnip seeds, beet seeds, and cabbage seeds come within that category. Are the seeds of the mangel-wurzel, turnip, beet, and cabbage "garden seeds?" It may be sometimes difficult to decide which of all the various classes of seeds should fall within the enumeration of "garden seeds;" and in determining what kind of seeds are embraced by that term, we do not think that the court can do better

than to adopt the definition given by the Treasury Department, in a letter addressed to the collector of customs at Philadelphia, bearing date of March 28, 1884, which is as follows:

> In common speech, garden seeds are seeds used either for planting or sowing in the gardens adjacent to dwelling-houses, small spaces of land, and in the larger spaces of land called market gardens lying about cities or other large places of numerous and condensed population. The common notion of garden seeds is this—that they are those seeds from which are raised, in the growing season of the year, the vegetable products which, before complete maturity, are used upon the table as part of the customary food of mankind, and in distinction from those seeds which, sowed or planted on a broader scale in the fields, produce the vegetables which are stored for winter use as food.
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> Yet it is to be taken note of, that by extended field culture there is produced much of the seed which finds its way to market and to sale as garden seeds in the common notion thereof above stated. It is not easy, therefore, to say of any importation, on general principles, that it is of garden seeds or of field seeds, nor to frame a rule, on general principles and general knowledge, which will always exactly apply.
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> We are constrained, therefore, to see if we can by interpretation get at the purpose of Congress, and if it did not intend to charge the phrase "garden seeds," in paragraph 465, with an arbitrary meaning. It has made an exception of the seed of one vegetable from the general expression "garden seeds." It must have been thought by Congress that there was need of that exception, or that else the seed excepted would properly and necessarily be treated by the ad-

ministrative officers of the Government as garden seeds.

It follows, then, that Congress thought that seeds like the seed of the sugar-beet were garden seeds. We have then an idea of what kind of seeds Congress meant when it spoke the phrase "garden seeds." Now, the sugar-beet is not a plant or a vegetable exclusively, nor mostly of the growth of gardens. It is, on the contrary, mostly the growth of the field or of the market garden. If the sugar-beet is in the view of Congress a garden plant, or vegetable, as well as, or in contrast with, a field plant, and its seed garden seed as well as, or in contrast with, field seed, surely the bean is in legislative contemplation a garden plant, or vegetable, and the bean of the market, which is the seed of the bean plant, is a garden seed as well as, or rather than, a field seed.

We know that, in fact, the bean, as a seed of the bean plant, or vegetable, is planted in the garden, and is largely planted in the field also—in the former case, generally, to be eaten green in the pod, as a green esculent, though sometimes, as with lima beans, in the form of the seed of the plant. In the latter case for the production of seed for subsequent planting, and for food in the form of the matured seed.

It is to be noticed, too, that elsewhere in the act, when garden seeds are mentioned, they are so in contrast or opposition to seeds which are not of the character of beans or other seeds used for sowing or planting both in field and garden. As in paragraph 94, where the phrase is "seeds, aromatic, not garden seeds," and "seeds of morbid growth;" and so in paragraph 636 the seeds put in the free-list are "seeds, aromatic, and seeds of morbid growth."

In the instructions of the Treasury Department to collectors of customs, we also find the following:

TREASURY DEPARTMENT,
November 7, 1884.

SIR: In reply to your letter of the 16th ultimo in which you inquire whether the Department intended in its decision of March 28, 1884 (Synopsis 6273), to include beet, carrot, cabbage, onion, and turnip seeds in the category of "garden seeds," dutiable at the rate of 20 per centum ad valorem, I have to inform you that the decision in question relates in terms only to beans and peas. The principle enunciated, however, embraces the seeds specified by you.

Very respectfully,

H. F. FRENCH,
Assistant Secretary.

To Collector of Customs, Rochester, N. Y.

In a letter addressed by the Treasury Department to the collector of customs at Boston, Mass., bearing date of March 7, 1884, we find the following:

> It has been decided that both lettuce and spinach seeds belong to the category of agricultural seeds, which are comprised under the commercial designation of "garden seeds," and which are dutiable at the rate of 20 per centum ad valorem under the special provision in Schedule "N."

In a letter of Hon. H. F. French, Assistant Secretary of the Treasury, addressed to the collector of customs at Philadelphia, bearing date of March 14, 1884, he says:

> Nasturtium seeds are generally, if not exclusively, planted in gardens, and produce besides flowers,

seeds, or berries which, when green, are largely used for pickling purposes, and in the manufacture of sauces. In my opinion such seeds are agricultural seeds, which come within the category of "garden seeds."

It may be that, according to the definition adopted by the Treasury Department, as hereinbefore referred to, mangel-wurzel seeds do not come within the category of "garden seeds," but however opinions may differ as to them, we submit that the court below was clearly right in holding that the cabbage and beet seeds in the declaration mentioned, were subject to the payment of the duty exacted thereon.

We submit also that the learned judge committed an error in holding that the turnip seeds were not subject to duty. According to the definition above given they are properly embraced within the term "garden seeds." They are sown in the smaller gardens adjacent to dwelling houses and in the larger spaces of land called market gardens. The vegetable products raised from them are extensively used upon the table as part of the customary food of mankind. There can be no reason shown why turnip seeds should not be embraced within the term "garden seeds" as well as asparagus, celery, cucumber, egg-plant, lettuce, spinach, radish, salsify, melon, parsnip, tomato, cabbage, carrot, onion, &c.

While we concede that the question presented is not altogether free from difficulty, so far as the mangel-wurzel seeds are concerned, we submit that upon a fair construction of the two clauses of the tariff act referred to, beet seeds, cabbage seeds, and turnip seeds come properly

within the category of "garden seeds" and are liable to a duty of 20 per centum ad valorem.

The case is one of considerable importance to the Treasury Department, and it is very desirable that some rule of construction should be laid down by which litigation may be avoided in the future.

Respectfully,

JOHN GOODE,
Solicitor General.

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